In the

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-552

THOMAS S. KLEPPE, SECRETARY OF THE INTERIOR, ET AL., *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

NO. 75-561

AMERICAN ELECTRIC POWER SYSTEM, ET AL., *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF

For Environmental Defense Fund, Inc.; Natural Resources Defense Council, Inc.; National Audubon Society, Inc.; Friends of the Earth; Environmental Policy Center; Environmental Action; Defenders of Wildlife; Colorado Open Space Council, Inc.; National Parks & Conservation Association

AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

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This brief is submitted by the above *Amici Curiae* in support of the position of Respondents Sierra Club, *et al.* that the judgment of the Court of Appeals in *Sierra Club v. Morton*, 514 F.2d 856 (D.C. Cir. 1975) should be affirmed.

All parties to the case have given their written consent to the filing of this brief, pursuant to Rule 42(2) of this Court, and their consents have been filed with the Clerk.

I. DESCRIPTION AND INTEREST OF AMICI CURIAE

The Environmental Defense Fund is a national organization of scientists, lawyers and economists working to protect the public interest in the areas of environmental quality, energy, and public health. Established in 1967 as a non-profit, public membership corporation, EDF has approximately 44,000 members nationally and offices in East Setauket, New York; New York City, New York; Denver, Colorado; Logan, Utah; Berkeley, California; and Washington, D.C. The National Environmental Policy Act has been a focus of EDF litigation and other actions involving federal programs and projects in energy development, water resource development, transportation, toxic chemicals and wildlife. EDF believes steady implementation of the Act's requirements has brought about noticeable, positive change in a number of the federal agencies, beneficial modifications in some projects and programs, and a broader consideration of alternatives and options, benefitting both the environment and taxpaying public. EDF has long been concerned with energy-related developments in the Northern Great Plains, and opened its Denver office in 1973 primarily to focus on those developments. The lawyers and scientists in EDF have conducted a wide variety of action programs with respect to energy and related water development problems in the region. Assuring compliance with NEPA is an essential element of these EDF programs which seek a rational balance between resource exploitation and environmental protection.

Natural Resources Defense Council, Inc. is a non-profit national organization with its principal place of business in New York City and offices in Washington, D.C., and Palo Alto, California. NRDC has some 23,000 members including

scientists, educators, lawyers, environmentalists and other concerned citizens who use and enjoy our natural resources and who seek to protect these resources and the human environment from unnecessary and unwise encroachment and destruction. Working through the courts and administrative agencies, NRDC from its inception in 1970 has been active in efforts to insure that federal agencies whose activities significantly affect the environment conform their decisionmaking to the standards established by Congress in the National Environmental Policy Act. NRDC believes the National Environmental Policy Act is perhaps the nation's single most important environmental law and believes further that it is responsible for a major improvement in both the procedure and substance of the decisionmaking of many of the agencies. NRDC is actively involved with energy related development in the Northern Great Plains region through its work with federal agencies concerning the formulation of sound policies on coal leasing, mining reclamation, protection of air and water quality and related issues. NRDC believes that proper implementation of NEPA by those federal agencies with responsibility for making decisions on energy-related development in the Northern Great Plains region would have invaluable, lasting benefits for the region and the nation as a whole.

The National Audubon Society, Inc. is a not-for-profit environmental organization, founded in 1905 and engaged in educative, scientific, investigative, and charitable pursuits to further the conservation of wildlife, habitat and other natural resources. Headquartered in New York City, National Audubon has 345,000 members in 365 chapters in 45 states and abroad. The National Audubon Society has actively supported the National Environmental Policy Act from its enactment, recognizing the enormous benefit the Act has brought and will continue to bring to federal project planning if properly enforced. The organization has pursued a course of oversight of the Act's implementation, publishing information on it, testifying before Congress, and in select circumstances litigating cases of NEPA violations in water resource projects, highways and wildlife. Application of NEPA to the Northern Great Plains energy-related developments is of particular

concern to Audubon and is one of the primary focuses for action of Audubon's Rocky Mountain regional office in Boulder, Colorado, and its 14 chapters in the four-state region. Audubon's concern with energy development in the Northern Great Plains is a part of its concern for a comprehensive national energy policy and sound management of the public lands.

Friends of the Earth is an international organization committed to the preservation, restoration, and rational use of the ecosphere. One of the major action programs of Friends of the Earth is focused on coal production and related environmental impacts in the Northern Great Plains. To this end it has established regional representatives in Billings, Montana; Missoula, Montana; Meeteetse, Wyoming; Alpena, South Dakota; Minot, North Dakota; and Denver, Colorado, to work directly in the region on energy-environmental problems. Friends of the Earth is also vitally concerned with the National Environmental Policy Act of 1969 and has been involved in litigation defending the Act in cases involving energy, water resource projects, highways and wildlife preservation. Incorporated in 1969 in New York, the organization has its major offices in San Francisco, New York City, and Washington, D.C. It has 23,000 members in the United States and has sister organizations in 14 foreign nations.

The Environmental Policy Center is a non-profit organization founded in 1972 to develop and make available the information needed for informed public participation in governmental decisions affecting the environment. The Center serves as the Washington base for legislative activities for many environmental, agricultural, community and citizen groups. The Center staff have invested considerable resources in investigating, analyzing and reporting on Northern Great Plains energy developments and their relationship to the Center's broad concerns with federal and state policies for energy development, water resource management, and land use planning. The National Environmental Policy Act of 1969 is a key tool in the Center's work, providing both the information and the incentive to bring about sound public resource planning and decisionmaking.

Environmental Action is a non-profit, political action organization designed to coordinate and support citizen efforts on behalf of the natural environment. One of its major programs is the publication of the magazine *Environmental Action* which regularly reaches Environmental Action's nearly 12,000 supporters throughout the country. Through the magazine and other educational programs, Environmental Action keeps citizens informed on topics of major environmental concern, particularly on Northern Great Plains energy developments and environmental impacts. The National Environmental Policy Act of 1969 has been and continues to be an overriding concern of the organization and Environmental Action has devoted much of its resources, its publication and education programs, and its legislative lobbying activity to insure the effectiveness of NEPA.

Defenders of Wildlife is a national, non-profit organization, headquartered in Washington, D.C. Founded in 1925, the organization promotes, through education and research, the protection of all mammals, birds, fish and other wildlife and the protection of environmentally proper habitat for these wildlife resources. The National Environmental Policy Act has proved a crucial force for protection of these wildlife resources, calling as it does for a generic change in federal planning and decisions. No other statute has the capability of reforming wildlife practices at this most basic planning level. Application of the National Environmental Policy Act's requirements to the Northern Great Plains Region is of vital concern to Defenders of Wildlife, since that region is one of the richest, most diverse wildlife resources remaining largely unimpacted by man's activities.

The Colorado Open Space Council, Inc. is a coalition of over 40 Colorado organizations, representing over 30,000 members in the fields of environment, recreation, and public health. Founded in 1965, COSC works through public education and information, legislative lobbying and direct contact with federal resource agencies to reform federal planning and decisionmaking with respect to the environment. Federal land management and NEPA decisions in the neighboring Northern

Great Plains have direct bearing upon future federal management plans for Colorado and are of intense concern to COSC. COSC strongly supports the National Environmental Policy Act, having lobbied for its passage in 1969 and further supported the bill in oversight hearings through the past six years.

The National Parks & Conservation Association is a non-profit conservation organization, headquartered in Washington, D.C., with approximately 45,000 members in the U.S. and abroad. NPCA was established in 1919 to protect the integrity of the National Parks and other public natural areas, to develop an informed appreciation for their significance, and to promote their enlargement. NPCA works closely with the federal agencies, scientific organizations and citizen groups concerned with federal land and resource management. The National Environmental Policy Act has been a positive force in NPCA's programs for improvement in federal management. The Northern Great Plains region is a key concern of the organization because of the potential impacts of energy development on the region's National Grasslands and other natural reserves and resources.

These *Amici* are responsible examples of the "concerned public and private organizations" that Congress expressly envisioned would play a large role in enforcing the National Environmental Policy Act. Section 101(a), 42 U.S.C. §4331(a); Sections 205(1), (2), 42 U.S.C. §§4345(1), (2).

ARGUMENT

Amici Curiae fully support the arguments of Respondents that the National Environmental Policy Act of 1969 (NEPA)[1] requires the preparation of a program-level environmental impact statement (EIS) covering energy-related developments in the Northern Great Plains region.

What most concerns *Amici* is that the Government's arguments in opposition to such a program-level EIS, if

[1] 42 U.S.C. §§4321-47 (1970).

adopted by this Court, could nullify the primary requirement of NEPA – namely that federal agency policies and actions affecting the environment be described, analyzed and weighed against their alternatives *before* the Government becomes so committed to a course of action that reasonable alternative courses are foreclosed.

That would be the effect of holding that as a matter of law federal planning for management of the energy resources of the Northern Great Plains cannot have reached the stage of a "proposal for . . . major Federal action," within the meaning of Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), requiring preparation of an EIS.

The determination of what constitutes a "proposal," sufficiently defined to require an EIS, is fundamental to this case and to the continued success of the Act. It is essential the term "proposal" be construed consistent with the sweeping goals for reform that led Congress to enact NEPA and the central role of the EIS in assuring those goals are met.

Parts I and II of this brief address those Congressional goals and the important changes in agency planning and decisionmaking NEPA has effected to date. Part III addresses the issues of EIS scope and timing presented in this case in light of the Congressional goals and agency practice.

I. CONGRESS INTENDED NEPA TO CAUSE MAJOR, NEEDED REFORM OF THE FEDERAL PLANNING AND DECISION PROCESS.

The National Environmental Policy Act of 1969 unites a carefully worded statement of national environmental policy with a statutory plan of action to put the policy into practice throughout the federal government decisionmaking process.

The urgent need for change in national priorities was keenly felt by Congress:

> The survival of man, in a world in which decency and dignity are possible, is the basic reason for bringing

man's impact on his environment under informed and responsible control. The economic costs of maintaining a Life-sustaining environment are unavoidable. . . . In our management of the environment we have exceeded its adaptive and recuperative powers, and in one form or another we must now pay directly the costs of maintaining air, water, soil, and living space in quantities and qualities sufficient to our needs. Economic good sense requires the declaration of a policy and the establishment of a comprehensive environmental quality program now. Today we have the option of channeling some of our wealth into the protection of our future. If we fail to do this in an adequate and timely manner, we may find ourselves confronted, even in this generation, with an environmental catastrophe that could render our wealth meaningless and which no amount of money could ever cure.[2]

The legislative history of NEPA confirms that it was enacted as a direct response to inadequacies in environmental decisionmaking on the part of the federal bureaucracy. Congress's solution and overriding goal was to cause fundamental change in the actual policy-setting, planning, and decisionmaking processes of the agencies.[3] In introducing S. 1075,

[2]S. REP. NO. 91-296, 91st Cong., 1st Sess. 17 (1969). Urgency was a dominant theme in the Congressional deliberations:

> Today it is clear we cannot continue on this course. Our national resources – our air, water, and land – are not unlimited. We no longer have the margins for error that we once enjoyed. The ultimate issue posed by short-sighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are [sic] clear.

Id. at 5 (footnote omitted).

[3]See, S. REP. NO. 91-296 at 4-17 (1969); L. Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENV. L. REP. 50030 (1976) (hereafter Caldwell); COUNCIL ON ENVIRONMENTAL QUALITY, THE THIRD ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 221-25 (1972) (hereafter 1972 CEQ ANN. REP.). The Council on Environmental Quality (CEQ) was created by NEPA. Sections 202-09, 42 U.S.C. §§4342-49. Its chief function is to oversee federal agencies' compliance with NEPA – "to review and appraise the various programs and activities of the Federal government

Senator Jackson, one of the primary authors of NEPA, called the Senate's attention to the need for fundamental reform:

> Our present governmental institutions are not designed to deal in a comprehensive manner with problems involving the quality of our surroundings and man's relationship to the environment. The responsibilities and functions of government institutions as presently organized are extremely fractionated. . . . This organization reflects our early national goals of resources exploitation, economic development, and conquest.
>
> Our national goals have, however, changed a great deal in recent years. Today Government organization does not reflect this change in objectives and new demands which are being placed on the environment.[4]

The Senate Report scored uncoordinated, incremental policies and decisionmaking as the root problem to be cured:

> As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in

[3](Continued)
in light of the policy set forth in [Sections 101 and 102] of this Act." Section 204(3), 42 U.S.C. §4344(3). The President's Executive Order implementing NEPA accordingly directs CEQ to "evaluate existing and proposed policies of the Federal Government directed to the control of pollution and the enhancement of the environment," "determine the need for new policies and programs," "coordinate Federal programs related to environmental quality," "issue guidelines to Federal agencies for preparation of [EISs] . . . required by Section 102(2)(C)" and "issue such other instructions to agencies . . . as may be required" to implement the Act. Section 3(a), (c), (f), (h), (i), Executive Order No. 11514 (March 5, 1970), 3 C.F.R. 271 (1974).

Current CEQ NEPA Guidelines are codified at 40 C.F.R. §§1500.1-14 (1973). The Guidelines are entitled to great weight in judicial evaluation. *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1178 (6th Cir. 1972); *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 86 (2d Cir. 1975).

[4]115 CONG. REC. 3699 (1969). See also, S. REP. NO. 91-296 at 4-5; 115 CONG. REC. at 40417.

the past. Policy is established by default and inaction. Environmental problems are dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.[5]

The Congressional reports and debates repeatedly cite "poor" federal "policies" and inadequate "planning" as major contributors to "environmental decay and degradation."[6] Reform was not viewed as possible "unless the results of planning are radically revised at the policy level."[7]

The central issue in this case – federal agency planning and decisionmaking in the development of our natural resources – was singled out as one of the most critical areas needing NEPA reform. The Senate version, which became the base for the Act, was:

> designed to minimize the conflict between resource development and the maximization of environmental values. Subsection 102(a) [present 102(2)(A)] requires all agencies to utilize the expertise and learning of all relevant disciplines in planning and decisionmaking on actions which may have an adverse impact on man's environment. Subsection 102(b) [present 102(2)(B)] requires the development of procedures designed to insure that all relevant environmental values and amenities are considered in the calculus of project development and decisionmaking. . . .
>
> The provisions . . . are designed to establish a policy and a set of planning procedures which will prevent instances of environmental abuse and degradation caused

[5]S. REP. NO. 91-296 at 5.

[6]*Id.* at 6-8, 12. See also, 115 CONG. REC. 26583 (House debates) and 29089 (Senate).

[7]S. REP. NO 91-296 at 20.

> by Federal actions before they get off the planning board.[8]

Congress recognized that stringent means would be required to bring about this fundamental reform in federal policies, plans and decisions. Complete structural reorganization of the executive branch[9] and separate, specific amendment of each agency's organic statutes to require environmental planning and decisionmaking[10] were considered and rejected. Instead, Congress chose primarily "non-structural" means to implement this across-the-board reform, combining (1) a broad statement of national environmental policy (Section 101), (2) environmental planning and study requirements (Sections 102(2)(A) - (I)), and (3) the critical "action-forcing" mechanism of the environmental impact statement (Section 102(2)(C)).[11]

Section 101(a) establishes as national policy that federal agencies shall "use all practicable means and measures" to "create and maintain conditions under which man and nature can exist in productive harmony."

The policy is amplified in Section 101(b) by six specific environmental mandates which require the federal agencies to improve and coordinate their "plans, functions, programs, and resources" to fulfill the national environmental policy.

[8]115 CONG. REC. 29055 (1969) (remarks of Sen. Jackson). See also, H. REP. NO. 91-378 (Part 1), 91st Cong., 1st Sess. 3 (1969) ("strip mining"); 115 CONG. REC. 29089 ("piecemeal approach to problems of natural resources") (remarks of Senator Allott); S. REP. NO. 91-296 at 6 (coordination of natural resource agencies), at 9 ("resource-oriented projects").

[9] See, Testimony of Dr. Lynton Caldwell, *Hearing on S. 1075, S. 237, and S. 1952 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 115 (1969) (hereafter 1969 Senate Hearings); Comment, *The National Environmental Policy Act Applied to Policy-Level Decisionmaking*, 3 ECOLOGY L. Q. 799, 806 n. 29 (1973).

[10]1969 Senate Hearings at 117 (remarks of Senator Jackson); 3 ECOLOGY L. Q., *supra* note 9, at 806 n. 30.

[11]S. REP. NO. 91-296 at 9; 115 CONG. REC. 40416 (1969) (remarks of Senator Jackson).

To implement further the Section 101 policy, Congress established in Section 102 a number of independent planning requirements – in addition to the EIS required in Section 102(2)(C). Section 102(2)(A) requires all federal agencies to "utilize a systematic, interdisciplinary approach" to insure use of the natural, social and environmental sciences "in planning and in decisionmaking."

Section 102(2)(B) requires the federal agencies to insure that environmental values are given "appropriate consideration in decisionmaking."

Section 102(2)(E) (formerly 102(2)(D)) requires agencies to "study, develop and describe" alternatives to their actions whenever there are unresolved conflicts over use of resources.

Section 102(2)(H) (formerly 102(2)(G)) requires that ecological information be initiated and used "in the planning and development of resource-oriented projects."

Congress recognized that, absent some "action-forcing" mechanism, implementation of these crucial environmental goals and planning mandates could not be assured. Section 102(2)(C) – with its requirement of a "detailed statement" on every proposal for major federal action significantly affecting the environment, including analysis of its environmental impacts and alternatives – was specifically designed by Congress to insure that its environmental policies and planning reforms are carried out.[12]

A leading contributor to the development of the EIS concept, Dr. Lynton K. Caldwell, has stated:

> The impact statement was required to force the agencies to take the substantive provisions of the Act seriously, and to consider the environmental policy directives of the Congress *in the formulation of agency plans and procedures.*[13]

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[12] Authorities, *supra* note 11.

[13] Caldwell, *supra* note 3, at 50033 (emphasis added). Dr. Caldwell served as Consultant to the Senate Interior Committee in the drafting of NEPA and first proposed the EIS.

The EIS process – properly applied – serves Congress's purpose in two essential ways. First, timely EIS preparation assures that environmental concerns are made a meaningful part of the agency decisionmaking process by requiring the agency to engage in a systematic analysis of a proposal before committing the Government to it. Second, the EIS fulfills NEPA's role as a "full disclosure law," giving Congress, other agencies, states and the public information on proposed agency actions, impacts and alternatives at a stage early enough to permit recourse to ordinary political processes to affect the decisions being made. See, *Silva v. Lynn*, 482 F.2d 1282, 1284-85 (1st Cir. 1973); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314, 1320 (8th Cir. 1974); *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1091 nn. 48, 49 (D.C. Cir. 1973).

Interpretation of 102(2)(C)'s language is subject to the overriding requirement of effectuating the Congressional purpose and policy behind the language. *Environmental Defense Fund, Inc. v. TVA*, 468 F.2d 1164, 1173 (6th Cir. 1972). Accord, *Richards v. U.S.*, 369 U.S. 1, 11 (1962); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943). Read in light of Congress's intense dissatisfaction with then existing agency planning and decisionmaking processes, Section 102(2)(C) clearly requires EIS preparation at a stage when agency policies, plans and decisions are still being formulated and major alternatives and options have not been foreclosed.

II. NEPA IS PROVING EFFECTIVE AS THE CONGRESSIONAL REMEDY FOR INADEQUATE FEDERAL PLANNING AND DECISIONMAKING.

Recognition of the importance of NEPA for federal agency planning and decisionmaking was immediate. The Presidential Executive Order No. 11514 (March 5, 1970) which implements the Act directs (Section 1):

> Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals.

Six years of experience with NEPA has demonstrated its positive contributions to sound planning and decisionmaking, including: (1) better consideration of environmental values, (2) minimizing the negative impacts of federal projects, (3) screening out some projects because of unacceptable impacts, (4) a greater environmental awareness among federal agencies, (5) improved interagency and intergovernmental cooperation, and (6) a greater public involvement in federal programs and projects.[14]

The Courts were also quick to recognize that the Act was intended to make a major, positive reform in federal planning and decisionmaking:

> The congressional mandate is clear. Federal officials are to appraise continuously all of their activities not only in terms of strict economic or technological considerations but also with reference to broad environmental concerns. They are to coordinate hitherto separate operations so that undesirable environmental effects may be perceived and minimized. Subject only to the limitation of practicability, they are to strive constantly to improve federal programs to preserve and enhance the environment. In other words, federal officials are required to assume the responsibility that the Congress recognized, in section 101(c) of the NEPA, as the obligation of all citizens: to incorporate the consideration of environmental factors into the decisionmaking process.

Environmental Defense Fund, Inc. v. TVA, 468 F.2d 1164, 1174 (6th Cir. 1972).

> The concept of that Act was that responsible officials would think about environment before a significant

[14]See, Testimony of Council on Environmental Quality, *Hearings on Oversight of the National Environmental Policy Act Before The Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 204-06 (1975) (hereafter 1975 NEPA Oversight Hearings); Testimony of Dr. James L. Cooley, *id.* at 185-86; 1972 CEQ ANN. REP. at 255-57.

> project was launched; that what would be assessed was a proposed action, not a fait accompli; that alternatives to such action would be seriously canvassed and assayed; and that any irreversible effects of the proposed action would be identified. The executive branch guidelines made even more clear that the purpose of the statute was to "build into the agency decision process" environmental considerations, "as early as possible," taking into account "the overall, cumulative impact of the action proposed (and of further actions contemplated)" and "environmental consequences not fully evaluated at the outset of the project or program."

Boston v. Volpe, 464 F.2d 254, 257 (1st Cir. 1972) (citation and footnote omitted). Accord, *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975); *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323, 1326 (4th Cir. 1972); *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *First National Bank v. Richardson*, 484 F.2d 1369, 1377 (7th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 470 F.2d 289, 293-94 (8th Cir. 1972); *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974); *Davis v. Morton*, 469 F.2d 593, 596 (10th Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*, 449 F.2d 1109, 1111-15 (D.C. Cir. 1971).

At the agency level, NEPA is becoming well integrated. There has been "a rapid evolution of agency compliance," according to a recent CEQ study on NEPA implementation, resulting in "significant benefits" to planning and decisionmaking.[15] CEQ concludes:

> The Congressional remedy proved effective. Federal agency procedures to build NEPA into their planning and

[15]COUNCIL ON ENVIRONMENTAL QUALITY, THE SIXTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 626, 628 (1975) (hereafter 1975 CEQ ANN. REP.). Caldwell, *supra* note 3, at 50030.

Roger Cramton, while Chairman of the Administrative conference of the United States, earlier confirmed the trend:

> decisionmaking now affect all levels of government .... The resulting analysis of environmental effects and alternative proposals – and the public disclosure of such information – have proved workable and critical parts of environmental protection policies.[16]

Agency support for NEPA and recognition of its benefits is well established. At the 1975 House Oversight Hearings, each of the six agencies testifying expressed a commitment to NEPA objectives and procedures, notwithstanding some problems encountered in their implementation.[17]

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[15](Continued)

> [I]he Act has produced ... a dramatic change in the perspectives of a number of Federal agencies. Even more change – the steady, sure change that is the result of building into the decision-making process new inputs, values and arguments – is around the corner.

Joint Hearings on the Operation of the National Environmental Policy Act of 1969 Before the Senate Comm. on Public Works and the Senate Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 412 (1972). See also, R. Cramton and R. Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973); 1972 CEQ ANN. REP. at 255-59.

But the reform is by no means complete. See F. Anderson *The National Environmental Policy Act* in FEDERAL ENVIRONMENTAL LAW 246-48 (E. Dolgin and T. Guilbert eds. 1974); E. Strohbehn, *NEPA's Impact on Federal Decisionmaking: Examples of Noncompliance and Suggestions for Change*, 4 ECOLOGY L. Q. 93 (1974).

[16]1975 CEQ ANN. REP. at 628. Subcommittee Chairman Leggett observed:

> Overall compliance with NEPA is generally improving as agencies incorporate and integrate environmental factors into their planning and decisionmaking processes.

1975 NEPA Oversight Hearings at 2.

[17]CONGRESSIONAL RESEARCH SERVICE, ADMINISTRATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT: SUMMARY OF 1975 OVERSIGHT HEARINGS AND STATEMENT OF COMMITTEE FINDINGS AND RECOMMENDATIONS 47 (1975).

In the hearings, Petitioner Army's Corps of Engineers stated it "fully supports" NEPA and stressed that "environmental considerations ... must be an integral part of the planning and decisionmaking process." 1975 NEPA Oversight Hearings at 3, 5. The Forest Service, of Petitioner Agriculture, testified that "the preparation of environmental statements

The Department of Interior, Petitioner herein, recently summarized the importance and effectiveness of the EIS process as follows:

> The EIS has a very definite influence upon Interior's decision process and upon decisions. First, it paces the process, causing intensification of the planning and plan coordination before an adequate statement can be prepared. ... It has a very significant effect in surfacing the more detailed, specific, and quantified information that a proper plan document requires, but formerly seldom achieved in surfacing policy and operational issues for decision. This latter effect takes place both during and after preparation of the EIS itself.[18]

Other agencies strongly concur.[19]

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[17](Continued)

... is now an integral part of our decisionmaking process." *Id.* at 39. Petitioner Interior's Bureau of Land Management stated "we believe in NEPA .... That is not just lipservice"; "Our way of life depends on it." *Id.* at 35, 37.

The Department of Transportation, which has prepared more EISs than any other agency, stated that "NEPA has had a major and beneficial effect on the Department's activities and environmental impact statements have played a central role in our decisionmaking process." *Id.* at 51. The Environmental Protection Agency described as "vital" NEPA's requirement for "incorporation of environmental concerns into the Agency decision-making process." *Id.* at 69. The Department of Housing and Urban Development credited the Act with bringing about "an improved end product" in its planning and projects. *Id.* at 85.

[18]Response of Department of Interior to CEQ Questionnaire (Question 2.02), published in vol. 5, 102 MONITOR 5-6 (June 1975).

[19]Other federal agencies responding to the CEQ questionnaire stated that the EIS process has "had a major influence on many decisions," "greatly broadened the planning perspective," caused many detrimental projects to be "significantly modified, re-evaluated, delayed or stopped," "stimulated more interdisciplinary involvement" and "resulted in better thought-out decisions." *Id.* at 4-5 (Responses of Department of Transportation, Soil Conservation Service, Army Corps of Engineers, Forest Service).

Questions about NEPA's value occasionally arise when it appears projects are held up by EIS procedures, leading to criticism of the Act for causing "delay" or increased "cost." These objections have been painstakingly investigated by CEQ and refuted.[20] Delays *attributable to the Act's requirements,* as opposed to agency "inefficiency in organizing and using the EIS process," have been "virtually eliminated," and the key factor in eliminating delay has been for the agency to begin environmental studies and EIS preparation "early" in the planning process of the program or project, CEQ concludes.

The effect of NEPA litigation in delaying federal projects has been "overplayed," according to the statistical analysis by CEQ; "only a small percentage of EISs do become the subject of litigation" and cases in which the courts have enjoined agency action for any period of time "constitute only a small proportion of the total cases."[21] Furthermore, court interpretation of the Act has played and will continue to play a vital role in insuring the Act's success; "achievements under the Act owe as much to judicial enforcement as to administrative initiative."[22]

The costs of compliance with NEPA are "relatively small compared to annual budgets or to the costs of major construction or licensing projects," CEQ concludes.[23] Further, even these "costs" have not been balanced against the dollar and resource *savings* inherent in NEPA compliance, from

[20]1975 CEQ ANN. REP. 634-40; 1975 NEPA Oversight Hearings at 204, 208-09. Caldwell, *supra* note 3, at 50033.

[21]1975 NEPA Oversight Hearings at 209.

[22]Caldwell, *supra* note 3, at 50031; F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT viii-ix, 275-92 (1973).

[23]For example, Petitioner Interior's Bureau of Land Management incurred FY 1974 NEPA costs representing only 1.3% of its annual budget; for Petitioner Agriculture's Forest Service the cost was 2.7% of budget; for Petitioner Army's Corps of Engineers, 1.2%. The Nuclear Regulatory Commission's 1975 NEPA costs equaled only 2.2% of the cost of a single, average-size nuclear power plant. 1975 CEQ ANN. REP. at 635-37.

project eliminations and modifications and from environmental, social and economic costs avoided by sound, advance planning.[24]

While the Congressional purposes of NEPA and the positive effects of NEPA compliance on agency planning and decisionmaking are clear, important issues of EIS *scope* and *timing* are presented in this case. The basic conceptual problems presented by Petitioners' arguments in this case raise a serious challenge to the continued effectiveness of NEPA.

III. THE SCOPE AND TIMING OF EIS ANALYSIS IS CRITICAL TO EFFECTUATE CONGRESS'S INTENT

The EIS – the "action-forcing" mechanism employed by NEPA – is a vital, but vulnerable, device upon which to rest Congress's intention to reform federal planning and decisionmaking. EISs, when properly prepared, have proved vital in fostering sound environmental planning and decisions. But the process is vulnerable to court and agency interpretations which restrict the scope and defer the timing of the required environmental statement to the point that is is no longer a part of the actual policy development, planning and decisionmaking of the agency, but only a post facto justification for decisions already made.

Congress clearly intended NEPA to be comprehensive in scope, applying not only to "project proposals" but also to "policy statements" and "programs."[25] Congress also

[24]For example, the Corps of Engineers has decided to stop or abandon 18 projects and has modified 174 other projects, as a result of its EIS analyses. Letter from Henry L. T. Koren, Deputy Under Secretary of the Army, to Russell W. Peterson, Chairman, CEQ, January 16, 1975. Other agency examples abound. 1975 CEQ ANN. REP. at 628-31; 1972 CEQ ANN. REP. at 226-27.

[25]S. REP. NO. 91-296 at 20.

intended NEPA to be applied at the most basic, "early stages of planning."[26]

It is universally accepted that NEPA requires policy-level, programmatic and regional EISs (collectively "program EISs")[27] depending on the facts of the particular situation and how the actual planning and decisionmaking process is shaped.

The program EIS requirement must be understood as a part of a multi-level EIS analysis:

> [T]he first statement prepared would cover pending legislation or broad, new federal policies; statements to follow would be prepared as each distinct initiative in implementing the legislation or policy was formulated.

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[26] *Id.*, Senator Church commented:

> [NEPA] marks an effort for the first time to impress and implant on Federal agencies an awareness and concern for the total environmental impact of their actions and proposed programs. *This awareness will be built into the agencies' planning processes at the lowest levels, where, as we all know, most decisions are formulated and even finalized.*

115 CONG. REC. 29059 (1969) (emphasis added). Then Secretary of Interior Walter J. Hickel emphatically agreed with this philosophy:

> Development of our natural resources as commodities must protect other resource values. . . . To accomplish this goal, we must build environmental values into the development process *from the beginning.*

1969 Senate Hearings, *supra* note 8, at 75 (emphasis added). The CEQ Guidelines repeatedly stress the need for early EIS compliance. 40 C.F.R. §§1500.1(a), 1500.2(a), 1500.2(b), 1500.7(a).

[27] A "program" EIS is one which analyzes a broad federal policy or a multi-component initiative such as the licensing or construction of a series of projects, related to each other operationally or by their cumulative impacts on a given area. See, Comment, *Planning Level and Program Impact Statements Under the National Environmental Policy Act: A Definitional Approach*, 23 U.C.L.A. L. REV. 124 (1975); F. Anderson, *supra* note 15, at 335-38; 1972 CEQ ANN. REP. 233-34.

> The later statements would cover increasingly specific programmatic initiatives and impacts, and would refer back to the wider, policy-oriented statements for their treatment of far-ranging alternatives and basic federal policy.
>
> Numerous advantages could be obtained through this approach. It would establish a record of least-cost, gradually circumscribed decision making without subjecting the agency to reconsideration of basic principles each time a specific action was contemplated.[28]

The U.S. Forest Service has adopted this multi-level approach with reported success,[29] and Petitioner Department of Interior endorses the method:

> Although the Department's procedures do not explicitly recognize various levels [of EISs], Interior was perhaps the first agency to implement the concept of a covering program environmental statement with separate project-type statements that were lower in hierarchical scale as they became more specific in nature (e.g., [Bonneville Power Administration's] construction program, off-road vehicle regulations, the oil shale program, the Eastern Powder River coal development). Depending upon the particular program involved we have utilized: (1) nation-wide program statements at the highest order of scale, (2) area or regional statements with a specific geographic extent, and (3) statements at the site construction or implementation level such as development concept plans, power plant site construction, etc.[30]

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[28] F. ANDERSON, *supra* note 22, at 290. See also, 1972 CEQ ANN. REP. 233-34.

[29] 1975 NEPA Oversight Hearings at 39-40.

[30] Response of Department of Interior to CEQ Questionnaire (Question No. 3.01) (CEQ public files, 1975). Interior further stated:

> We believe also that we can see a definite improvement in the planning process itself as well as in plan implementation because of program environmental statements. This is because the program statement focuses planning attention more forceably on repetitive, aggregative, and cumulative problems.

Id., Response to Question No. 2.03.

The multi-level approach is critical to effectuate NEPA's goals. First, it accurately reflects (and encourages) the real-world decision process, from basic goal setting to evaluation of alternative means. Second, early articulation of policy or program goals permits public scrutiny and decreases the tendency toward incremental or segmented decisionmaking. Third, it permits a broad spectrum of alternatives to be analyzed early in the planning process before important alternatives are eliminated. Finally, subsequent, more specific EIS stages can be prepared with greater efficiency by building upon and updating the data and decisions made in the earlier statements.[31]

Contrary to its perceptive comments about program/regional EISs and multi-level analysis, Interior in this case seeks to avoid one of these essential steps – an EIS covering energy-related federal management in the Northern Great Plains. Interior presents two standard arguments: (1) The Northern Great Plains region is not the relevant geographic scope for Interior policy-making and planning and (2) even if it is, the timing is not ripe for a regional EIS because no formal regional "plan" has yet been developed or "proposed." These assertions fly in the face of two of the most essential precepts of NEPA – (1) that the requisite scope for compliance is the scope of the policy underlying the action, and (2) that environmental analysis must come at the earliest possible stages in the planning process.

A. THE PROPER SCOPE FOR THIS LEVEL OF EIS ANALYSIS IS THE NORTHERN GREAT PLAINS REGION.

Elsewhere, Interior has correctly described the necessary NEPA analysis as encompassing: (1) a "national program statement," followed by (2) "regional statements," and finally (3) "site" or project-level statements.[32] Interior is attempting, in this case, however, to avoid the requirement for regional EIS analysis by confusing that intermediate level analysis with

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[31]See, 3 ECOLOGY L. Q., *supra* note 9, at 808; 23 U.C.L.A. L. REV., *supra* note 27, at 162; F. ANDERSON, *supra* note 22.

[32]Text accompanying note 30, *supra*.

the site-specific level and by claiming the latter as a substitute for both. This is plainly in conflict with Interior's actual policy and planning treatment of the region and with sound NEPA analysis.

To date, Interior has produced an EIS purporting to cover coal leasing nationally[33] and a project-level EIS covering a limited number of specific coal leases and related power/rail projects.[34] In neither EIS is assessment made of the actual scope of energy-related federal management policies and actions for the Northern Great Plains region which is underlain by the coal resources of the Fort Union Formation (Eastern Montana–Wyoming and Western Dakotas). In neither have certain fundamental issues been analyzed – whether energy developments should be concentrated or dispersed; whether strip mining should be restricted to areas where reclamation potential is best; whether deep mining is feasible; how scarce water supplies should be allocated between energy development, agriculture, fish and wildlife, and navigation.

Finally, none of these EISs analyze the cumulative impacts of development on the region as a whole.

Significant federal policies and actions, and their consequences, are being omitted from NEPA consideration. Equally seriously, this "telescoping" wholly fails to reflect the actual, real-world policies and planning of the Government, which are clearly focused on the region as an entity.

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[33]U.S. DEPT. OF INTERIOR, FINAL ENVIRONMENTAL IMPACT STATEMENT: PROPOSED COAL LEASING PROGRAM (1975). For a critical review of this EIS, see THE INSTITUTE OF ECOLOGY, A SCIENTIFIC AND POLICY REVIEW OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED FEDERAL COAL LEASING PROGRAM (K. Fletcher ed. 1974).

[34]U.S. DEPT. OF INTERIOR, FINAL ENVIRONMENTAL STATEMENT: PROPOSED DEVELOPMENT OF COAL RESOURCES IN THE EASTERN POWDER RIVER COAL BASIN OF WYOMING (1974).

Interior's actual policy of treating the Northern Great Plains as a discrete region for development of coal has been manifested on numerous occasions, dating back at least as early as the Secretarial "policy directive" of 1973. The policy directive was restated as follows in Interior's program Decision Option Document on Coal Leasing in December 1975:

> Over the past two years, Federal coal leasing actions have been processed in accordance with a policy directive by Secretary Morton of January 24, 1973. . . . In part the January 24, 1973, directive states:
>
> > ". . . *all actions of any kind regarding development* of coal related to the Southwest and *Northern Great Plains* covered by the June 16, 1971 and June 30, 1972 memoranda . . . shall be submitted to the Under Secretary for review and concurrence prior to execution."
>
> *The June 30, 1972, memorandum refers to coal reserves in the Fort Union Region of Montana, North Dakota, South Dakota, and Wyoming . . . .*
>
> It is appropriate at this time to review this policy directive given the possible decision to begin leasing actions on an expanded scale.[35]

Interior's policy for augmented coal development throughout the Northern Great Plains as a region was reaffirmed in the recent testimony of the Secretary of Interior before the U.S. Senate in February:

> [G]iven that significant reserves are under lease and given that we can expect additional leasing and development in the *Northern Great Plains* due to intense industry interest, the value of regional and sub-regional planning for the development of federally leased reserves

[35]BUREAU OF LAND MANAGEMENT, PROGRAM DECISION OPTION DOCUMENT: THE PROPOSED FEDERAL COAL LEASING PROGRAM 74 (December 16, 1975) (emphasis added).

> remains of high priority. Therefore, Interior reaffirms its commitment to study the regional or sub-regional socio-economic and environmental impacts of coal leasing and development.
>
> Examples of this commitment in action are the comprehensive reports of the Northern Great Plains Resources Program, the policy announcement to prepare regional coal and coal related environmental impact statements . . . .[36]

Other examples of Interior's actual "commitment" to a regionwide development policy include its REPORT ON WATER FOR ENERGY IN THE NORTHERN GREAT PLAINS AREA (1975). That report "encompass[es] 63 counties in Wyoming, Montana, North Dakota, and South Dakota" and states that its purpose is specifically to "assist management officials in making decisions on site-specific energy development" in the area (at vii).

Secretary Kleppe has summed up the contradiction undermining Interior's opposition to a Northern Great Plains regional EIS:

> We deny that we are controlling the development of resources in a region. Rather we intend only *prudent management of Federal coal resources.*[37]

It is precisely these policies, programs and decisions for "prudent management" of federal resources in the Northern

[36]Written response of Secretary of Interior Thomas S. Kleppe, to Question #3 submitted by the Subcommittee, *Hearings Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs* (February 16, 1976) (emphasis added).

[37]Testimony of Secretary of Interior Thomas S. Kleppe, Hearings, *supra* note 36, typescript page 12 (emphasis added).

Great Plains which have not been analyzed under NEPA, frustrating the most basic and obvious intent of Congress.

B. THE PROPER TIMING OF THIS REGIONAL EIS IS NOT DICTATED BY *SCRAP II*.

The Government's argument in this case rests entirely on its claim that no "proposal" now exists for major federal action with respect to energy resources of the Northern Great Plains. (Federal Petitioners' Brief at 2-3.) Absent such a proposal, say Petitioners, no EIS is required under this Court's holding in *Aberdeen & Rockfish R.R. v. SCRAP*, 422 U.S. 289, 322 (1975) (*SCRAP II*). But an agency's conclusory denial that a policy, program or plan exists does not, in itself, resolve the issue. A federal proposal may be both distinct and comprehensive even where an agency has not formally announced steps toward its realization. As the Court of Appeals noted below (514 F.2d at 873):

> At a minimum, the courts must reserve the right to analyze federal actions to determine if, in fact, a comprehensive program, however labeled, is underway or proposed.

The Court of Appeals correctly ruled (514 F.2d at 878):

> It is our view that when the federal government, through exercise of its power to approve leases, mining plans, rights-of-way, and water option contracts, attempts to "control development" of a definite region, it is engaged in a regional program constituting major federal action within the meaning of NEPA, whether it labels its attempts a "plan," a "program," or nothing at all.

It held, as a matter of law, that "comprehensive major federal action is contemplated in the Northern Great Plains" (514 F.2d 878), that is, a de facto "proposal" for regional management exists, the Government's denial notwithstanding.[38] The remaining question the Court of Appeals faced was the question of timing – whether development of the program is ripe for preparation of an EIS. On this point the Court remanded to update the record.

The danger to NEPA posed by the Petitioners' argument in this case stems not merely from their limited view of what constitutes a "proposal," but also from their interpretation of this Court's holding in *SCRAP II* with respect to the time at which an EIS must be prepared.

In *SCRAP II*, under applicable ICC rules, the railways as private entities initiated freight rate increases through self-revised rate schedules. Plaintiff environmental groups challenged these rates as discriminating against recycled materials. At issue was the stage in the proceedings where the ICC's reaction to the privately proposed rate increases became sufficiently defined to constitute a "proposal" for *federal* action, requiring an EIS. Emphasizing that the agency had "made no proposal" and was not involved in planning the increase, this Court held that the final EIS was not required until the ICC made its "recommendation or report" on its own "proposal" for a federal action. 422 U.S. at 320-321. Given the unique character of the ICC proceedings, the federal "proposal" for NEPA purposes was held to be the actual recommendation approving or disapproving the railway's unilateral action; the "recommendation" and "proposal" were, under the circumstances of this regulatory review, one and the same.

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[38] While Petitioners make much of the Court of Appeals' use of the word "contemplated" – arguing that contemplation is too vague to constitute action (Federal Petitioners' Brief at 24, 39-42) – it is clear that the Court was using "contemplated" as synonymous with "planned" just *as the CEQ Guidelines do:*

> The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action *proposed*, related Federal actions and projects in the area, and further actions *contemplated*.

CEQ Guidelines, 40 C.F.R. §1500.6(a) (emphasis added), cited by the Court, 514 F.2d at 871; see also, 514 F.2d at 879.

Unlike the instant case, *SCRAP II* presented no questions of federal agency program or project planning; nor was it a case in which the concerned agency was directly involved in resource development through construction programs, licenses, permits, options and rights of way; nor were irretrievable commitments of resources being made. In short, the ICC's role entailed only reactive review, totally inapposite to the role of Petitioners in this case. The *SCRAP II* opinion expressly recognizes its inapplicability in contexts such as this. The Court pointed out that where the agency initiates a proposal "the statute would appear to require an impact statement to be included in the proposal" prior to any agency report or recommendation. 422 U.S. at 32.

Thus, *SCRAP II* is not at issue in this case. Even if it were held that federal agencies could postpone EIS preparation until they actually made their decisions – which *SCRAP II* certainly did not hold – a regional EIS would nevertheless be required in this case. The Department of Interior has already issued numerous mining leases, executed water option contracts, granted rights-of-way and approved at least seven mining plans in the region without preparation of the regional EIS required by NEPA. 514 F.2d 864-66, 875. The case is far beyond the "proposal" stage of *SCRAP II*. The numerous, related federal decisions that have been made and, with this Court's lifting of the injunction, are being and will be made clearly necessitate a regional EIS.

Petitioners, however, would have this Court declare that the holding in *SCRAP II* flatly governs the timing requirement for preparation of EISs of *all* federal agencies. In effect, Petitioners are arguing that *SCRAP II* allows agencies to defer EIS preparation until the terminal stages of agency planning and decisionmaking – when the agency admits to having a *formal, final recommendation for action.* To read one phrase in Section 102(2)(C) as permitting postponement of NEPA compliance until critical planning is completed, decisions made and options foreclosed is directly contrary to the most basic Congressional purpose of the Act. And the Congressional purpose must control interpretation of the Act. *Environmental Defense Fund, Inc. v. TVA, supra,* 468 F.2d at 1173; *Richards v. U.S., supra,* 369 U.S. at 11; *SEC v. C. M. Joiner*

Leasing Corp., supra, 320 U.S. at 350-51. Certainly, the EIS must be available in time to be "include[d] in [the] recommendation or report on [the] proposal." But it must be prepared early enough in the proposal formulating process so that the ultimate proposal and recommendation thereon are formulated, analyzed and decided with the benefit of the "action-forcing" analysis required by the EIS.

Petitioners' attempts to extend *SCRAP II* to their actions is not merited on the facts of this case and has been explicitly rejected by the Council on Environmental Quality, the agency charged with overseeing NEPA compliance. Responding to the problems of applying *SCRAP II's* ICC guidance to other agencies, with vastly different mandates and procedures, CEQ issued the following advisory opinion:

> SCRAP presented unique facts and a narrow decision. The ICC's three types of proceedings – a broad investigation of the entire rate structure, a concurrent review of the incremental rate increase, and the opportunity for parties to challenge specific increases – are not characteristic of most agencies. . . .
>
> Procedurely, the Court stated that final statements [EISs] are due when a federal "proposal" exists. But the Court did not define what a "proposal" is or provide other guidance for identifying federal proposals.
>
> In view of the ambiguity of the definition of "proposal" and the narrow facts of the case, the Council recommends no general change in agency NEPA procedures.[39]

The timing of impact statements is not susceptible to a simple, categorical rule that will cover all situations and all agencies. This was properly recognized by this Court in

[39]Memorandum to the Heads of Agencies from R. Peterson, Chairman, Council on Environmental Quality (November 26, 1975), reprinted in 1975 NEPA Oversight Hearings at 246, 247. Accord, Comment, *SCRAP II: No Excuse for NEPA Foot-Dragging,* 5 ENV. L. REP. 10126 (1975), reprinted in 1975 NEPA Oversight Hearings at 239-46.

SCRAP II (422 U.S. at 320) and by the Court of Appeals, below, in developing its four-part "balancing" test for ripeness: (1) likelihood of program implementation, (2) availability of information, (3) irretrievability of commitments, and (4) severity of ultimate environmental effects. 514 F.2d at 880; *Scientists' Institute for Public Information v. AEC*, 481 F.2d 1079, 1094 (D.C. Cir. 1973).

The balancing approach recognizes that NEPA's effectiveness depends upon integrating the EIS analysis into the actual planning and decisional process of the agency. As the Court noted (514 F.2d at 882, n. 35):

> The impact statement is intended to aid agency planning and decision-making *before* the final recommended proposal for action is made. (Emphasis in original.)

CEQ has repeatedly stressed the need for *early* EIS preparation to effectuate the Congressional intent. In testimony before Congress in 1975, CEQ Chairman Peterson testified:

> [T]he environmental impact statement process has significantly changed and improved Federal decision-making. . . . [T]oday people are integrating the NEPA process early in their decisionmaking. *They are making changes in the plans before they adopt proposals, as a result of the studies and investigations which the Act envisioned.*
>
> . . . .
>
> *Federal agencies differ in the kind of decisions they must make and in the time when they must make them.* It has been CEQ's job to help provide general EIS guidelines for all these different situations consistent with the need for useful statements at the earliest appropriate stage.[40]

[40] 1975 NEPA Oversight Hearings at 212-13 (emphasis added).

Were the preparation of EISs held categorically to await the agency recommendation on a final proposal, the EIS would fail to serve the very purpose for which Congress intended it -- to force agency *implementation* of the environmental goals established in Section 101 of NEPA.

The generality of Section 102(2)(C)'s language is purposeful. It is designed to allow the timing of the EIS to be adjusted to cover varied actions and grossly dissimilar agency processes. The balancing test developed by the Court of Appeals, below, represents the most significant and successful attempt to date to provide a standard for determining when federal policies, programs, plans, and actions have reached the stage where the "action-forcing" EIS of Section 102(2)(C) is required to meet the environmental goals in Section 101.

III. CONCLUSION

For the foregoing reasons, we join Respondents in urging that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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